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OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

In The
Supreme Court Of The United States

October Term, 1952 1953

No. 128

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, a body corporate, et al.,
Appellants,

vs.

STATE MILK COMMISSION OF THE COMMONWEALTH OF VIRGINIA,
Appellee.

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Comes now appellant, the Arlington County Board, and submits this memorandum brief in opposition to appellee's motion to dismiss the appeal in this case, or in the alternative to affirm the judgment of the court below. Appellant prays that the Court deny the motion and note probable jurisdiction.

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QUESTIONS PRESENTED

The contention of appellee is that there is no substantial constitutional question because of previous decisions of this Court.

On the other hand, appellant contends that the decisions cited by appellee, and appellee's arguments, do not support its motion. Appellant further contends that the prior decisions of this Court uphold appellant's contentions that the Virginia Milk Commission had no jurisdiction over the prices of milk delivered from District of Columbia distributors to Arlington consumers, because of the interstate commerce involved.

REPLY TO APPELLEE'S CONTENTIONS

1. *The Milk Deliveries are not peddling operations in Intrastate Commerce, as might be inferred from Appellee's Presentation of the Facts, and from its reliance upon Wagner* v. *Covington* 251 U.S. 95, *and Caskey Baking Co.* v. *Virginia*, 313 U. S. 117.

Both of the cited cases involved imposition of business license taxes, one for a peddler of soft drinks, the other for a peddler of bread. In both decisions the U. S. Supreme Court emphasized, in almost identical language, that these statutes did not license or tax the activity of transporting the goods across State lines, but rather the purely local business of peddling (see 251 U. S. 103 and 313 U. S. 119).

To the contrary of appellee's position here, the Supreme Court said in the earlier of the above-cited cases (251 U. S. 100):

> "It is indisputable that with respect to the goods occasionally carried upon plaintiffs' wagon from one

State to the other in response to orders previously received at their place of business in Cincinnati, plaintiffs are engaged in interstate commerce, not subject to the licensing power of the Kentucky municipality."

The record in this case shows that about 75 percent of the retail sales to consumers are on the preorder basis, which were like those held not subject to the licensing power of Kentucky. Therefore, the above-cited case is authority contrary to appellee's contention, and supports appellant's position that such sales are not subject to Virginia price regulation.

2. *Appellee errs in its Counsel's Statement that Appellant "Concedes" that Wholesale Sales in Interstate Commerce are Subject to State Price Regulation, while Contending the Retail Sales are not Subject to State Regulation.*

No such concession has ever been made by appellant, and there is absolutely nothing in the record to justify appellee's contention to that effect.

To the contrary, from the very beginning of this matter, appellant has always contended that the U. S. Supreme Court had said, in *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 614-6, that the wholesale sales in interstate commerce were not subject to State jurisdiction, and hence appellant has always contended that retail sales from District of Columbia distributors directly to Arlington consumers, also should not be regulated by the State Milk Commission. Counsel for appellee quotes, in fact, from appellant's memorandum brief to the court below, where appellant's counsel said:

"There is no essential difference between Highland

> and High and between the Thompson Dairy (likewise Chestnut Farms) and the writer of this brief who receives their milk at his doorstep."

In other words, the status of the wholesale sales was not attacked, because appellant has regarded that question as having been decided; and the decision of this Court was that these direct, interstate, wholesale sales of milk were *not* subject to State regulation. All through this proceeding, from the beginning, appellant has taken the position that there is no difference, in principle between the wholesale and retail sales directly from the District of Columbia distributors to Arlington purchasers, and that neither are subject to State price regulation because the milk moved directly in interstate commerce.

In its motion, appellee says: "The evidence shows that the sales are made under identically the same conditions". Appellant has no quarrel with that statement, because it is so, and because the wholesale sales were found *not* subject to Virginia price regulation in the *Highland case*, supra. Neither should the retail sales directly from the District of Columbia distributors be subject to State regulation.

The mistake made by appellee's counsel is in the following comparison:

> "Certainly milk delivered to a restaurant in fluid form is delivered 'for consumption' in the State. Is there any difference between the consumer on the doorstep and the consumer in the restaurant? Of course, a restaurant too is a consumer as well."

The status of the sale as being subject to State price regulation has nothing to do with the fact of consumption. The rule to follow was stated by the U. S. Supreme Court in

Highland Farms Dairy v. *Agnew, supra,* (300 U. S. at page 615):

> "Highland in Washington may sell to High in Virginia and High may buy from Highland at any price they please. Not till the milk is resold in Virginia within a market area will the price minimum apply, and then only to the price to be charged on resale."

The difference in the situations described by appellee's counsel is that the consumer of milk in an Arlington restaurant has paid a price upon "resale", whereas there has been no resale when the milk comes to the consumer directly from the District of Columbia. This latter sale, like the wholesale delivery from Highland to High, should be "at any price they please", regardless of the Virginia Milk Commission to the contrary.

3. *The Exercise of the General Price-Fixing Authority of State Law does not justify Regulation of Prices of Commodities moving in Interstate Commerce.*

Cases cited by appellee's counsel dealing with the "due process of law" involved in price-fixing of milk, had nothing to do with the problem of regulating interstate commerce; these cited cases were *Nebbia* v. *New York,* 291 U. S. 502, and *Reynolds* v. *Milk Commission,* 163 Va. 957. They are not relevant to the issues of interstate commerce involved in this case; see *Hood & Sons* v. *Du Mond,* 336 U. S. 525, 530.

Counsel for appellee says of State regulation: "its purpose in fixing minimum resale prices is to conserve health and promote economic stability among Virginia producers." But this Court has held that such purposes do not justify State regulation of milk prices in interstate commerce.

In *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511, 524, this Court said: "but commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another, in the faith that augmentation of prices will lift up the level of economic welfare, and that this will stimulate the observance of sanitary requirements in the preparation of the product." Therefore, this Court has ruled contrary to appellee on the point.

4. *This is not a Case of State Regulation which Incidentally Affects Interstate Commerce prior to the Interstate Movements; and the Case of Milk Board* v. *Eisenberg Co., 306 U. S. 346, is not in point.*

Counsel for appellee relies upon the Eisenberg case, cited. In that case this Court upheld the State regulation of milk prices paid to Pennsylvania producers by Pennsylvania receivers who subsequently transported the milk from the receiving stations to New York. But the Court did so on the ground that the regulation was "local in Pennsylvania", before the interstate movement began, which was quite a different situation from the Arlington situation, saying (pp. 352-3):

> "The activity affected by the regulation is essentially local in Pennsylvania. Upon the completion of that transaction the respondent engages in conserving and transporting its own property. The Commonwealth does not essay to regulate or to restrain the shipment of the respondent's milk into New York or to regulate its sale or the price at which respondent may sell it in New York. If dealers conducting receiving stations in various localities in Pennsylvania were free to ignore the requirements of the statute on the ground that all or a part of the milk they purchase is destined to

another state the uniform operation of the statute locally would be crippled and might be impracticable. Only a small fraction of the milk produced by farmers in Pennsylvania is shipped out of the Commonwealth. There is, therefore, a comparatively large field remotely affecting and wholly unrelated to interstate commerce within which the statute operated. These considerations we think justify the conclusion that the effect of the law on interstate commerce is incidental and not forbidden by the Constitution, in the absence of regulation by Congress."

This limitation to the scope of the *Eisenberg* case was specifically pointed out in *Hood & Sons* v. *Du Mond*, 336 U. S. 525, 530.

In the Arlington case we have a much different situation than in the Eisenberg case. Here, less than one-half the milk supply for the metropolitan area comes from Virginia; and about two-thirds of the milk from distributors in northern Virginia comes from the District of Columbia. When these movements are directly in interstate commerce, they are not within the jurisdiction of State regulation.

5. *Appellee has failed to answer Appellant's point that Federal Statutes do not permit Virginia Regulation of Interstate Commerce.*

Appellant has contended that Virginia regulation is not a proper substitute for Federal regulation. Federal regulation of minimum farmer-producer prices was once in effect, from November 1945 to March 1947; but was terminated by three-fourths vote of the producers. While the Federal statute does not regulate prices from distributors to consumers; the Virginia price-fixing order is restrictive on in-

terstate commerce, and "can claim neither federal sponsorship nor congressional sanction"; and should be regarded as unauthorized regulation of interstate commerce; see *Hood & Sons* v. *Du Mond, supra,* (336 U. S. 540-545).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should deny the motion to dismiss the appeal or in the alternative to affirm the judgment below; and appellant prays that the Court note probable jurisdiction.

Respectfully submitted,

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